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In the Supreme Court of the United States

CHARLOTTE J. CHENOWETH, PETITIONER,

v.

HILLSBOROUGH COUNTY, a political subdivision of the State of Florida, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Americans with Disabilities Act ("ADA") prohibits covered employers from discriminating in the terms and conditions of employment, and defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A). The Act further defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102 (1). The issues presented in this petition are:

1. Whether Epilepsy, *when manifested by sporadic consciousness-losing seizures*, is a "disability" within the meaning of the ADA.

2. Whether *maintaining consciousness* is a "major life activity" and, if so, whether it is "substantially limited" by sporadic, consciousness-losing seizures.

3. Whether an employer's failure to provide a reasonable accommodation, *requested at a time when an employee's impairment substantially limited a major life activity*, is retroactively forgiven because the substantially limiting effect of the impairment is, at some later point in time, eventually eliminated by the use of a corrective measure.

4. Whether the ADA requires an employer to accommodate a *collateral* limitation (i.e. one that does not substantially limit a major life activity) of an employee's impairment which restricts the ability to work, when the *direct* limitation (i.e. the one that does substantially limit a major life activity) of the impairment has no relevance to the employee's ability to work or to the accommodation requested.

RULES 14.1(b) and 29.6 STATEMENT

There are no disclosures to be made as required by rules 14.1(b) and 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charlotte Chenoweth ("Ms. Chenoweth"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* at 1a-4a) is reported at 250 F.3d 1328 (11th Cir. 2001). The court of appeals denial, *per curium*, of Ms. Chenoweth's petition for rehearing (App., *infra* at 5a) is not reported. The opinion of the United States District Court for the Middle District of Florida (Pizzo, M.) (App., *infra* at 6a-18a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2000. Ms. Chenoweth filed a timely petition for rehearing, which was denied, *per curium*, on June 25, 2001. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §12111, et seq., together with relevant portions of the regulations implementing this statute, are reproduced in the Appendix to this Petition. (App., *infra* at 19a-25a).

STATEMENT OF THE CASE

In passing the American's with Disabilities Act ("ADA" or "Act"), Congress had, as one of its objectives, the honorable goal of trying to assist disabled individuals in becoming and remaining productive, self-sufficient members of American society. The ADA furthered this particular objective by making certain disabled individuals *a protected class*, with special rights and privileges in regard to obtaining and maintaining employment. The Act identifies a member of this protected class as an "individual with a *disability* who, with or without *reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." §12102 (8). (Emphasis added). The Act further defines a "disability" as including "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." §12102 (2)(a). One of the more significant special rights that the ADA provides to a disabled worker is the right to obtain "reasonable accommodations" from an employer. The Act defines "reasonable accommodation" as including "making existing facilities used by employees readily accessible . . . job restructuring, ...part-time or *modified work schedules*, . . . appropriate adjustment or modification of . . . policies, . . . and other similar accommodations . . .." §12111(9)(A) & (B). (Emphasis added). An employer is generally required to provide such accommodations, unless it is able to "demonstrate that the accommodation would impose an *undue hardship* on the operation of the business . . .." §12112(b)(5)(A). (Emphasis added).

This statutory scheme for determining when an employer is obligated to provide an accommodation, involves a three-part analysis. First, it must be determined whether the employee is *a qualified individual with a*

disability. Next, it must be determined if there is any *reasonable accommodation* that will assist or enable the employee in performing the essential functions of the targeted job. Finally, it must be determined whether providing such an accommodation would cause the employer *undue hardship.*

The instant case involves four important questions in the application of this statutory scheme which, as of yet, have not been resolved by this Court. The first is whether Epilepsy, *when manifested by unpredictable, reoccurring, convulsive, consciousness-losing seizures,* substantially limits *any* major life activity. The second, a sub-part of the first, is whether "maintaining consciousness" is a major life activity and, if so, whether it is substantially limited by sporadic consciousness-losing seizures. The third is whether the limiting effects of an impairment should be viewed, as they are known to exist at the time an accommodation is denied, or as they eventually exist at some later point in time when they have been successfully mitigated. The final question, is whether employers are required to accommodate *collateral limitations* of a qualified disability or, as the Eleventh Circuit has herein held, *only those limitations of the disability that substantially limit some major life activity.*

A. **Factual Background.**

On March 27, 1995, Ms. Chenoweth, a 39 year old registered nurse with over 14 years experience, was hired as a Utilization Review Nurse in the Department of Health and Social Services for Hillsborough County. ("the County"). (R1-16-13 to 16). Ms. Chenoweth's duties primarily involved case management of qualified Hillsborough County residents, covered by the County's tax funded indigent healthcare insurance program. (R1-16-43 to 47). In the course of performing these duties, Ms. Chenoweth worked at the County's central office in Tampa, as well as at various

hospitals operated by the County. (R4-68-51 to 54). The County required Ms. Chenoweth to work from 7:30 a.m., until 4:30 p.m., Monday through Friday. At the time she was hired (and at all times material herein), Ms. Chenoweth resided in Pinellas County, a neighboring county to Hillsborough, and drove 30 minutes from her home in Safety Harbor, across Tampa Bay, to her job in Tampa. (R4-68-47).

In January 1997, Ms. Chenoweth suddenly began experiencing convulsive, consciousness-losing seizures. (R4-68-34).[1] She also began experiencing frequent auras.[2] The consciousness losing seizures occurred about once a month; the auras occurred on a daily basis, sometimes several times a day. (R4-81-22 to 23). On March 12, 1997, neurologist, James Stevenson, diagnosed Ms. Chenoweth with focal onset Epilepsy (R4-81, Ex. C, pp. 12&19), and restricted her from operating a motor vehicle until her seizures could be brought under control, i.e. *until she had been free of consciousness-losing seizures for at least six months*. (R4-81-Exh. C, p.49). Dr. Stevenson also advised Ms. Chenoweth not to bath or cook alone, or to engage in any other type of activity that could endanger herself or others if she were to suddenly lose consciousness. (R4-81-Exh.C, p.30).

Because public transportation was not reasonably available between Pinellas and Hillsborough counties, Ms. Chenoweth's inability to drive an automobile forced her to become totally dependent upon the availability of family and friends in order get to work. (R4-68-72 to 76). During this time, Ms. Chenoweth's primary means of getting to work

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[1] Her seizures were witnessed to be total loses of consciousness, involving massive muscle contractions and convulsions. Her face was described as distorting beyond what was imaginable. (R4-81-44).

[2] Dr. Stevenson testified that an aura is a "partial seizure" which signals the potential onset of a generalized seizure. He described an aura as the spark that can ignite the fire of a general seizure. (R4-81-Exh.C, p. 35).

was her father, who dropped her off two hours early, at 5:30 a.m. on his way to work each day. A variety of different people gave her rides home at the end of each workday. (R4-81-41). As a result, on May 21, 1997, Ms. Chenoweth *requested accommodations* from the County, which, if granted, would have reduced her need to depend upon others in order to get to and from work, and would have given her the flexibility she needed to deal with doctor's appointments and, otherwise, care for her illness. (R2-36-51 to 52). The two accommodations requested by Ms. Chenoweth were to be permitted *to work from home* two days per week, and to be allowed to work a *modified work schedule* that would allow her to start work at 5:30 a.m. (R1-16-48). On May 23, 1997, the County denied Ms. Chenoweth's request for accommodation. (R2-36-40). On August 15, 1997, Ms. Chenoweth, still not being able to drive, made a second request for an accommodation, this time asking for a *flexible work schedule* that would begin between 6:00 and 8:30 a.m. and would end, eight hours later, between 3:00 and 5:30 p.m. (R2-36-50). The County also denied this request.

In an attempt to find a prescription that would control Ms. Chenoweth's seizures, without causing any significant adverse side effects, Dr. Stevenson prescribed various dosages of different medications, eventually settling on Lamictal. (R4-81-Exh.C, pp. 22 to 34). After going on the Lamictal, Ms. Chenoweth's auras declined, and her last loss of consciousness occurred on May 14, 1997. (R4-81-Exh.C, pp. 51-52). In June 1997, however, the frequency of Ms. Chenoweth's auras sharply increased to an almost constant state of aura, causing Dr. Stevenson to increase the dosage of her Lamictal. (R4-81-Exh. C, p. 34). Thereafter, when Ms. Chenoweth adjusted to this increased dosage, her auras resumed their decline in frequency.

Although Ms. Chenoweth had already started taking seizure medication at the times the County denied her

requests for accommodation, *it was not known, at those times, how effective the medication would be, or whether or when she would ever actually get her seizures under control and, therefore, be able to resume driving.*[3] It was also not known how long Ms. Chenoweth would be able to continue relying upon others to drive her to and from work each day, how dependable they would be in getting her to work on time, or when her medical absences would exceed her permissible leave time.

With her last loss of consciousness having occurred in May 1997, and having experienced a steady decline in the frequency of her auras since June 1997, Ms. Chenoweth was able to resume driving in February 1998. During the time that Ms. Chenoweth was unable to drive (from March 1997 until February 1998) she was consistently able to perform all of the essential functions of her job. (R4-68-38).[4] Ms. Chenoweth continues to be employed by the County as of the filing of this petition.

B. District Court Proceedings

In September 1997, after obtaining a right to sue letter from the Equal Employment Opportunity Commission ("EEOC") (R1-16-42), Ms. Chenoweth filed this action in the United States District Court for the Middle District of

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[3] Dr. Stevenson testified that only about 70% of Epileptics who suffer consciousness-losing seizures are able to be controlled through medication (R1-81-Exh. C, p. 21).

[4] Although Ms. Chenoweth, with the help of her family and friends, was ultimately able to get to work, on time, during the entire year she was unable to drive, it is respectfully submitted that her extraordinary efforts to avoid putting her job at risk, as a result of the County's wrongful refusal to accommodate her, should neither penalize her nor reward her employer by forgiving its wrongful refusal to fulfill its legal obligation to provide Ms. Chenoweth with a meaningful accommodation.

Florida. Ms. Chenoweth claimed to be a qualified individual with a disability and alleged the County violated the ADA[5] by refusing the accommodations she requested.[6] (R1-1).

Throughout most of the district court proceedings, the County conceded that Ms. Chenoweth's Epilepsy was a "qualified disability under the ADA," disputing only the reasonableness of the accommodations requested. (R3-55-4 to 5). Then, on the eve of trial, shortly after this Court issued its June 22, 1999 decision in *Sutton v. United Airlines*, 527 U.S. 471 (1999), the County requested (R4-68) and obtained (R4-70) permission to retract its pretrial admission, and, thereafter, moved for summary judgment. In support of its motion for summary judgment, the County argued, based on the holding in *Sutton*, that Ms. Chenoweth was not a "qualified individual" under the ADA because her medication was successful in controlling her consciousness-losing seizures. The County also asserted that the accommodations Ms. Chenoweth requested were unreasonable as a matter of law. (R4-68).

In opposition to the County's motion, Ms. Chenoweth argued that the corrective effect of her seizure medication should have been viewed as of the times the County denied her requests for accommodation and that, at those times, her medication did not yet have her seizures under control. She also argued that she was still "disabled," even after her medication was able to bring her seizures under control, because the side effects of her seizure

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[5] Ms. Chenoweth filed claims under both the ADA and the Rehabilitation Act of 1973, 29 U.S.C. §794, *et seq*. Because both Acts use the same standard in determining what is necessary to show discrimination, those claims will be discussed together in this brief. 29 U.S.C. § 794(d).

[6] Ms. Chenoweth also alleged that the County had retaliated against her for requesting an accommodation of her disability, but that claim was settled and is not in issue here.

medication substantially limited her major life activity of reproduction. *See Bragdon v. Abbott,* 524 U.S. 624 (1998). With regard to the accommodations she requested, Ms. Chenoweth argued that their reasonableness was a question of fact, inappropriate for summary judgment. (R4-81 & 84).

The district court rejected Ms. Chenoweth's arguments and granted summary judgment in favor of the County. In granting judgment for the County, the district court, citing *Sutton,* stated that it was "*required* to consider corrective measures in determining whether plaintiff is substantially limited in any of her major life activities." (App., *infra* at 11a). (Emphasis added). After rejecting Ms. Chenoweth's claims of being substantially limited in numerous major life activities, and after concluding that she was not "similarly impacted" as was the plaintiff in *Bragdon,* the district court found "that plaintiff is one of those individuals whose *corrected physical limitations* fell short of the definition of "disabled" and that she is not covered by the ADA." (App., *infra* at 17a). (Emphasis added). With regard to the reasonableness of Ms. Chenoweth's requested accommodations, the district court reasoned that "because attendance is an essential function of employment, an employee's inability to get to work on time makes the employee unqualified to perform the functions of the job," and, therefore, in effect, concluded that the accommodations Ms. Chenoweth requested were unreasonable as a matter of law. (App., *infra* at 16a –17a).

C. The Eleventh Circuit Decision

On appeal, Ms. Chenoweth argued:

1. That she was a "qualified individual" under the ADA because her unmitigated seizures substantially limited numerous major life activities, particularly "working" and

"driving," and because her seizures were not yet mitigated at the time the County denied her requests for accommodation.

2. That she was a "qualified individual", even after her medication eventually mitigated her seizures, because her Epilepsy, and the side effects of her seizure medication, still substantially limited numerous major life activities, particularly "reproduction;" and

3. That the reasonableness of the accommodations she requested was a question of fact, inappropriate for summary judgment.

In support of Ms. Chenoweth's appeal, the Epilepsy Foundation filed an Amicus Brief, based on its expertise in understanding the impact of Epilepsy, arguing that Ms. Chenoweth's seizures also substantially limited her major life activities of "caring for oneself" and "interacting with others."

In affirming the judgment of the district court, the Eleventh Circuit began by stating "the principle issue on this appeal is *whether inability to drive to work for six months qualifies as an impairment substantially limiting a major life activity* under the Americans with Disabilities Act . . . or under the Rehabilitations Act . . .." (App., *infra* at 2a). (Emphasis added). After acknowledging the importance of driving in American society, the circuit court concluded that driving is "conspicuously different in character" than the activities enumerated by the EEOC in 29 C.F.R. §1630.2(i), and "cannot sensibly be compared to inability to see or to learn." (App., *infra* at 4a). The circuit court went on to find that Ms. Chenoweth was not substantially limited in the major life activity of working, because "she produced no evidence that she was, in fact, *unable to perform her job*."

Finally, the Eleventh Circuit rejected Ms. Chenoweth's claim of a substantial limitation on her major life activity of reproduction, because "the increase in risk in this regard *had no relevance to her work* for the County *or to her request* to the County *for accommodation.*" (App., *infra* at 4a). (Emphasis added).

In reaching its decision, the Eleventh Circuit did not address whether Ms. Chenoweth was substantially limited in the major life activities of "caring for oneself" or "interacting with others," or in any of the other major life activities that are so obviously impacted by unpredictable, reoccurring, convulsive, consciousness-losing seizures; it also did not indicate whether it had analyzed the impact of Ms. Chenoweth's seizures with regard to the corrective effect of her seizure medication as of the time her requested accommodations were denied, or as of a later point in time when her medication was ultimately able to bring her seizures under control; and it did not address the reasonableness of Ms. Chenoweth's requested accommodations.

In response to the Eleventh Circuit decision, Ms. Chenoweth filed a timely petition for rehearing, arguing that the circuit court had misunderstood the ultimate issue in this case, i.e. whether her seizures substantially limited *any* major life activity. In support of her petition for rehearing, she argued that numerous major life activities, including seeing, speaking, walking, caring for oneself, and the heretofore-unidentified major life activity of "maintaining consciousness," were, in fact, all substantially limited by her seizures.

In a decision filed on June 25, 2001, the Eleventh Circuit denied Ms. Chenoweth's petition for rehearing, *per curium*. (App., *infra* at 5a).

REASONS FOR GRANTING THE WRIT

1. *The decision of the Eleventh Circuit will be cited as authority that Epilepsy is not a "disability" within the meaning of the ADA, even when manifested by sporadic seizures, sufficiently severe to restrict driving, bathing alone and other activities that would be dangerous to the impaired individual if they were to lose consciousness.* Congress and the EEOC have long recognized Epilepsy as a disability. Discrimination in the employment process, particularly for persons suffering from Epilepsy, was one of the central motivating factors for Congress' passage of the ADA. This Court, in its recent decision in *Sutton*, both in the majority and dissenting opinions, indicated that it did not intend to remove Epilepsy from the protections of the ADA. As various courts have interpreted and restricted the provisions of the ADA, however, it has become increasingly difficult to find legal support for placing Epilepsy within the definition that the Act sets forth for a "disability." As it currently reads, the decision of the Eleventh Circuit will further this problem because it will be cited as authority in support of the argument that Epilepsy, even when it is manifested by unpredictable, reoccurring, convulsive, consciousness-losing seizures, is not a disability within the meaning of the ADA.

2. *The decision of the Eleventh Circuit will be cited as authority that employers are not obligated to accommodate collateral limitations of a disability.* Such a holding establishes a heretofore-unseen obstacle in the path of disabled workers, and is directly contrary to the plain language of the ADA.

3. *There is much confusion amongst disabled individuals, employers and the courts over how to determine when an impairment rises to the level of a "disability" under*

the ADA, and when and under what circumstances a qualified individual is entitled to accommodation. As is evident from the factual and procedural history of this case, there exists, in the minds of employers and the United States District and Circuit Courts, confusion over how to apply the provisions of the ADA when determining whether a particular impairment is a "disability," and in determining when and to what extent an employer must go to accommodate a disabled employee. The employer in this case refused to accommodate an Epileptic employee who suffered from consciousness-losing seizures. The district court misinterpreted *Sutton* as requiring it to view the impact of Ms. Chenoweth's Epilepsy as it was eventually mitigated by medication, rather that as it existed at the time her requested accommodations were actually denied; misunderstood the reasoning in *Bragdon* with regard to *why* the plaintiff therein was considered to be substantially limited in the major life activity of reproduction; and misapplied the provisions of the ADA that govern when and under what circumstances an employer is obligated to accommodate a disabled employee, and in determining what is and what is not a reasonable accommodation. The circuit court, in its decision, did very little to correct these significant misunderstandings of the district court; held, in tension with the decision of the Eighth Circuit in *Otting v. J.C. Penney Company* 223 F.3d 704 (8th Cir. 2000), that Epilepsy, manifested by sporadic consciousness-losing seizures, sufficient to prevent an individual from driving, and from bathing and cooking alone, is not a "disability" with in the meaning of the ADA; and created a new requirement that disabled employees must establish before an employer will be obligated to accommodate the limitations of their disability, i.e. that the limitation to be accommodated must, itself, substantially limit a major life activity.

It is submitted that a great deal of this confusion, and the litigation resulting therefrom, would be eliminated if

there were clearer guidelines for determining who is disabled and what types of accommodations are appropriate. Because of the particular facts of this case, it presents an ideal forum within which to analyze the unique impairment of Epilepsy[7] and its general eligibility as a "disability" under the ADA. Such analysis will benefit all who suffer from this, or any similar, debilitating impairment. The instant facts also provide this Court with the opportunity to provide clear guidance to employers on how to make the difficult and confusing decision of whether or not to provide an accommodation to a disabled employee, as well as to impaired individuals in evaluating what they should expect from employers in this country. Such guidance would benefit all individuals and employers who are covered by this honorable act.

4. *The decision of the Eleventh Circuit will operate to effectively bar Ms. Chenoweth from ever obtaining the protections of the ADA, as it will most certainly be cited, res judicata, that she is not "disabled".* It is acknowledged that Ms. Chenoweth does not *presently* need the accommodations that she previously requested from her employer because her medication currently has her seizures under control. It is submitted, however, that she did, in fact, need those accommodations, both at the time they were refused and at the time the instant litigation was initiated. It is further submitted that she may need them in the future, as it is not uncommon for Epileptic seizures to reoccur, even after they have been controlled by medication for several years. For these reasons, Ms. Chenoweth is in need of, and entitled to, a *legally correct* determination of her claims in this action.

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[7] Dr. Stevenson testified that Epilepsy is different from most other disabilities in that it is a "disability of intermittent dramatic interruptions in any activity" as opposed to more common chronic, persistent disabilities. (R4-81-Exh. C, pp. 36 to 37).

I. THE ELEVENTH CIRCUIT COURT OF APPEALS MISUNDERSTOOD THE FUNDAMENTAL ISSUE PRESENTED IN THIS APPEAL, i.e. WHETHER MS. CHENOWETH'S EPILEPSY, WHICH WAS MANIFESTED BY UNPREDICTABLE, REOCCURRING, CONVULSIVE, CONSCIOUSNESS-LOSING SEIZURES, SUBSTANTIALLY LIMITED *ANY* MAJOR LIFE ACTIVITY, SUCH THAT WOULD QUALIFY HER, UNDER THE AMERICANS WITH DISABILITIES ACT, AS AN INDIVIDUAL WITH A DISABILITY, ENTITLED TO REQUEST A REASONABLE ACCOMMODATION FROM HER EM-PLOYER.

Ms. Chenoweth contends that she is "disabled," within the meaning of the ADA, because her Epilepsy, when manifested by unpredictable, reoccurring, convulsive, consciousness-losing seizures, substantially limited numerous major life activities, including, *but not limited to*, "caring for oneself," "maintaining consciousness," "working" and "driving." In its decision, the Eleventh Circuit acknowledged that Ms. Chenoweth suffered from focal onset Epilepsy, and that her Epilepsy resulted in seizures, sufficiently severe to prevent her from *safely* being able to drive an automobile, or to bath or cook alone. In reaching its conclusion that such seizures did not substantially limit any major life activities, however, the appellate court limited its consideration solely to the activities of driving, working and reproduction, ignoring the activities of "caring for oneself" and "maintaining consciousness," as well as all the other activities that are so obviously impacted by such seizures.

It is Ms. Chenoweth's position that the "principal issue" on this appeal is not, as stated by the Eleventh Circuit,

"whether inability to drive for six months qualifies as an impairment substantially limiting a major life activity," but whether there is *any* major life activity that was substantially limited by her seizures. Under the particular facts of this case, resolution of this ultimate issue involves consideration of three sub-issues:

1. Whether the mitigating effects of a corrective measure should be evaluated, as they are known to exist *at the point in time when a discriminatory act occurs*, or at some later point in time when a corrective measure ultimately becomes effective.

2. Whether the substantially limiting effects of Ms. Chenoweth's seizures were, in fact, *meaningfully mitigated* at the points in time when the County denied her requests for accommodation.

3. Whether the effects of Ms. Chenoweth's unmitigated seizures were substantially limiting of *any* major life activity.

This Court has held that the ADA requires the effects of corrective measures to be taken into account when judging whether a person is "substantially limited" in a major life activity and thus "disabled" under that Act. It has also held that a person must be "presently" substantially limited in order to demonstrate a disability, i.e. a "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken." This Court reached these conclusions, in part, because the phrase "substantially limits" appears in the Act's definition of "disability" in the present indicative verb form. *See Sutton* at 42. Although this Court did not expressly say so, it is assumed, in requiring limitations to "presently" exist, that it

meant, "exist" *at the time the alleged discriminatory act occurs.*

1. The limitations of Ms. Chenoweth's seizures should be evaluated as they were known to exist at the points in time when the County denied her requests for accommodation.

In *Sutton*, the petitioners asked this Court to view the limiting effects of their impairments, not as they actually existed at the time the alleged discriminatory act occurred, but as they existed at some *earlier* point in time when said limitations had *not yet* been mitigated by corrective measures. In rejecting this request, this Court concluded that the plain reading of the ADA required a finding that the petitioners were not disabled at the time of the alleged discriminatory act, because the limiting effects of their impairments had been corrected. The instant case is somewhat the reverse of the facts that were presented in the *Sutton* decision. Here, the County is asking the courts to view the limiting effects of Ms. Chenoweth's seizures, not as they existed at the times it denied her requests for accommodation, but as they existed at some *later* point in time when the effects were *eventually* mitigated.

Based on this Court's holding that the statutory language of the ADA *requires* limiting effects to be viewed with regard to their *present* corrected status, it is Ms. Chenoweth's position, that such rule should operate, not only to *disqualify* an impairment from being considered a disability when it is not, at relevant time, substantially limiting, but also to *qualify* an impairment as a disability when corrective measures have not yet mitigated its substantially limiting effects. To state this another way, an employer, when determining whether it is legally required to accommodate the limitations of an employee's impairment, should view such limitations as they presently—not

potentially or hypothetically—exist at the time of the determination, with any mitigating effect of an available corrective measure being considered only after it is actually mitigating, not when it might, could or would be mitigating, should the corrective measure eventually succeed. To hold otherwise, would not only be inconsistent with the plain language of the statute, but also contrary to the reasoning of this Court in *Sutton*. It would also have the undesirable result of allowing an employer, solely based on speculation, to deny a needed accommodation, requested at a time when it is not known whether the limiting effects of an impairment can be mitigated, in hopes that it would be *retroactively* relieved of its obligation under the ADA if a corrective measure ever becomes successful.

2. The substantially limiting effects of Ms. Chenoweth's seizures were not yet *meaningfully* mitigated at the time the County denied her requests for accommodation:

If it is accepted that Ms. Chenoweth's seizures, prior to the time they were meaningfully mitigated, substantially limited at least one of her major life activities (see subpart 3 below), and that the substantiality of the limiting effects of her seizures must be viewed as those limitations were known to exist at the points in time when the County denied her requests for accommodation (see subpart 1 above), then the issue becomes, when were the limitations of Ms. Chenoweth's seizures *meaningfully* mitigated.

Ms. Chenoweth's last consciousness-losing seizure occurred on May 14, 1997. The County denied her requests for accommodation in May and in September of that year. Ms. Chenoweth's Neurologist[8] and Florida law[9] required her

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[8] Dr. Stevenson testified that 30% of Epileptics who suffer from seizures are not controllable through medication and that, because the seizures are

to be free of consciousness-losing seizures for *at least* six months before she would be permitted to resume driving an automobile. The logical assumption behind these restrictions being that a person prone to such seizures must be able to go at least six months without losing consciousness before they will be considered, within a reasonable degree of legal and medical certainty, to have regained the *ability to rely on maintaining their consciousness.*[10] Six months after Ms. Chenoweth's last seizure would have been November 1997.[11] Because Ms. Chenoweth had not gone six months without a consciousness-losing seizure, as of May or September 1997, it was not yet known if her seizures were under control and, therefore, Ms. Chenoweth had not yet regained her ability to rely on maintaining her consciousness. Until Ms. Chenoweth knew that she could once again *rely* on her ability to maintain consciousness, the limiting effects of her impairment were not meaningfully mitigated.

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sporadic, that it is necessary for an Epileptic patient to be seizure free for at least six months before their seizures can be medically considered to be under control. (R4-81-Exh.C,pp. 21&49).

[9] Florida law requires people with Epilepsy to be seizure free for at least six months, be under regular medical supervision, and submit a current neurological evaluation in order to get a drivers license. See §§ 322.16, 322.221, Fla. Stat. (1999).

[10] See testimony of Dr. Stevenson. (R4-81-Exh.C, p. 49).

[11] Even though her last seizure was in May, a reasonable inference is that the increased aura activity, which occurred in June, suggested that Ms. Chenoweth was about to have another seizure if her medication was not adjusted. Although the issue never came up, another reasonable inference is that she would not have been considered, legally or medically, fit to resume driving until at least six months after this last medication adjustment.

3. At the time the County denied Ms. Chenoweth's requests for accommodation, her Epileptic seizures substantially limited *numerous major life activities*, including "caring for oneself," the heretofore-unidentified major life activity of "maintaining consciousness," "working" and "driving:"

In order to analyze whether any of Ms. Chenoweth's major life activities were substantially limited by her Epileptic seizures, it is first necessary to understand what type of seizures she suffered from.[12] Although there are several types of Epileptic seizures, for the purpose of this analysis, they can be divided into three primary categories: those that do not cause loses of consciousness, those that cause sporadic loses of consciousness, and those that cause such frequent loses of consciousness (multiple times per day) that the individual cannot function in their own home, let alone in the workplace. (R4-81-Exh. C, pp. 8 to 9). Ms. Chenoweth's seizures are the type that cause sporadic loses of consciousness. (R4-81-Exh.C,p.19).

We are not herein addressing whether seizures that do not cause loses of consciousness are, in and of themselves, substantially limiting of any major life activity. If they are, then certainly so are the other two categories of

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[12] Epilepsy is a chronic brain disorder. W' ile proper diagnosis and medication can mitigate the effects of the condition, it is a life-long diagnosis. (R4-81-Exh.C, p.19). Epilepsy is characterized by seizures. Physiologically, seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, accompanied by sensory, motor and/or behavior changes. See H. Gastaat, Dictionary of Epilepsy, Part I: Definition (1973). There are many different types of seizures: simple and complex partial, and convulsive, non-convulsive, absence and tonic clonic generalized seizures. Symptoms include loss of sensory and motor control, loss of muscle tone or control, automatisms, massive muscle contractions, convulsions, and impairment or total loss of consciousness. (R4-81-Exh.C, pp.8 to 10)).

seizures. We are also not addressing the type of seizures that cause such frequent loses of consciousness that the person cannot leave their home. Such seizures are without question substantially limiting of numerous major life activities. They would, however, not be the type contemplated by Congress in enacting the accommodation provisions of the ADA, because such Epileptics would not, even with accommodation, be able to perform the essential functions of most jobs. If Congress intended for any category of Epileptic seizures to be entitled to employment accommodations, it would have been the one involving sporadic loses of consciousness.

While the ADA does not define the term "substantially limiting," the implementing regulations issued by the EEOC provide that an impairment is substantially limiting if it prevents the individual from participating in a particular major life activity, or alternatively, "if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population . . .." 29 C.F.R. §1630.2(j)(1) (1999) (defining "substantially limits"); see also *Bragdon* at 640 (holding that an impairment is substantially limiting even if the difficulties resulting from the impairment are not "insurmountable"). This regulation further directs that, in determining if an impairment is substantially limiting, the nature and severity, duration or expected duration, and actual or expected, permanent or long-term, impact of the limitation should be considered. 29 C.F.R. §1630.2 (j)(2).

Individuals, who suffer from sporadic loses of consciousness, are substantially limited in numerous major life activities. The stigma that they suffer, as a result of having a convulsive, consciousness-losing seizure in public and being labeled as an Epileptic, has a severe impact on

their ability to socially interact with others.[13] Women of childbearing age have significantly increased risks of stillbirths, miscarriages and infant mortality. There is also an increased chance that their children will develop Epilepsy.[14] They live their entire life in constant fear of having a seizure, knowing that they could lose consciousness at any moment.[15] They cannot engage in any activity that might cause harm to themselves or others were they to lose consciousness. They cannot bath or cook alone; they cannot drive an automobile; they cannot safely engage in any type of recreational activity that carries risk, i.e. bicycle riding, roller skating, snow skiing, scuba diving, etc. While a seizure is occurring, they cannot care for or protect themselves, walk, speak, see, hear, learn or perform manual tasks. Their inability to drive further limits their ability to work.

A similar conclusion was reach in *Otting v. J. C. Penney Company*, 223 F.3d 704 (8th Cir. 2000). In that case, the Eighth Circuit observed "Otting's seizures, *although sporadic, occurred frequently enough that she was prohibited by law from driving* and could not take baths by herself for risk of drowning if a seizure occurred." *Id.* at 710. (Emphasis added). The court also observed, when Otting suffered a seizure, that she was unable to see, hear, speak, walk, work or control the left side of her body. Based on these facts, the Eighth Circuit held that Otting was

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[13] In enacting the ADA, Congress recognized that irrational fears and misconceptions about disabilities, including Epilepsy, can be as debilitating as the impairments themselves. See 136 Cong. Rec. S7422, S7442 (1990). This Court has also recognized Epilepsy as a stigmatizing condition. *See School Bd. v. Arline*, 480 U.S. 273, 284 (1987).

[14] *See* Epilepsy Foundation, *Epilepsy & Pregnancy* (1998).

[15] Fifty percent of people with Epilepsy report that the single worst thing about Epilepsy is living with the fear of another seizure. *See* Epilepsy foundation, *Report to the Nation* 5 (1999).

"disabled" because her Epilepsy substantially limited the major life activities of walking, seeing, and speaking. *Id.* at 710-711.

Although it is submitted, based on the reasoning in *Otting*, that anyone who suffers from sporadic consciousness-losing seizures should generally be considered to be "disabled," it is recognized that the ADA requires an "individualized" analysis of the limiting effects that Ms. Chenoweth's impairment has on her major life activities. *See Sutton.* For this reason, we will more particularly address four specific major life activities that were substantially limited by Ms. Chenoweth's seizures, in addition to the obvious three the *Otting* court identified.

a. Ms. Chenoweth's seizures substantially limited her major life activity of "caring for oneself":

i. Ms. Chenoweth's inability to drive forced her to be dependent on others to care for herself. By their nature, seizures are unpredictable, both in frequency and severity. For a person like Ms. Chenoweth, who suffers from sporadic consciousness-losing seizures, the possibility of a sudden loss of consciousness presents a constant threat. It is for this reason, that she was not able to drive a motor vehicle and, therefore, became totally dependent on family, friends and public transportation in order to do the daily things that she needed to do to take care of herself, including getting to work, to the doctor, to the grocery, and to any other place that she needed to get to in order to obtain the various necessities of life.

ii. Ms. Chenoweth was unable to protect herself from common societal hazards when she was having a seizure. Whenever Ms. Chenoweth experienced a consciousness-losing seizure, she was totally vulnerable to the environment

around her. If the seizure occurred while she was in public,[16] unscrupulous humans or vicious animals could attack her; while she was crossing the street, an automobile could strike her; or while she was eating, she could choke. As a result, she had to substantially modify the way she lived her life, making sure that she never did anything that would put her in a position to suffer harm were she to suddenly lose consciousness.

Because Ms. Chenoweth's seizures forced her to become totally dependent on others for all of her transportation needs, and because she was completely unable to protect herself whenever she lost consciousness, her ability to care *for herself* was substantially limited.

b. Ms. Chenoweth's seizures substantially limited her major life activity of "maintaining consciousness".

i. Maintaining consciousness is a "life activity:" In suggesting that "maintaining consciousness" is a *life activity*, it is necessary to distinguish the physical/mental "state" of consciousness from the "activity" of *maintaining* consciousness. This distinction can perhaps best be illustrated by comparing a full loss of consciousness with the altered consciousness of sleep. While it may be possible to fall asleep involuntarily, as when we are tired and driving a long distance at night, we can generally avoid falling sleep by providing ourselves with appropriate stimuli, such as walking, conversation, etc. Further, if we are asleep and hear a noise or are touched, we normally have the ability to immediately awaken to protect and care for ourselves. With the loses of consciousness that resulted from Ms.

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[16] Ms. Chenoweth did, in fact, have a seizure where she was found by her neighbor, unconscious, laying on the ground in her front yard. (R4-68-34 to 35).

Chenoweth's Epileptic seizures, there was nothing she could do to maintain her consciousness, even when she had advance warning, such as an aura, that a seizure was coming. Further, while she was having a seizure, she could not be brought back to consciousness through normal stimuli.

ii. Maintaining consciousness is a "major" life activity. This Court has determined that "the touchstone for determining an activity's inclusion under the statutory rubric [of major life activity] is its significance." *Bragdon* at 638 (quoting *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997). It is submitted that there are few activities more "significant" than maintaining consciousness. Maintaining consciousness is an activity that is *essential to our daily lives*, in much the same way as walking, seeing, speaking, hearing, breathing and learning. Our ability to function in this world, and in this society, is totally dependent upon our ability to maintain consciousness. Without the ability to maintain consciousness, most of life's other activities are impossible. If we are not able to maintain consciousness, we are not able to care for or protect ourselves. We are also not able to engage in any activity, whether necessary or discretionary, which requires consciousness in order to remain safe (i.e., bathing, cooking, driving, climbing ladders, operating machinery, snow skiing, scuba diving, rollerblading, etc.). Even something as simple and common as walking in public, becomes dangerous when a sudden loss of consciousness could leave us vulnerable to public hazards, such as oncoming traffic, defenseless to vicious animals, or subject to theft or other grievous bodily harm from unscrupulous individuals.

iii. Unpredictable, consciousness-losing seizures "substantially limit" the major life activity of maintaining consciousness. If it is accepted that maintaining consciousness is a major life activity, then the issue becomes whether one's ability to maintain their consciousness is

substantially limited by the sporadic, involuntary loses of consciousness that result from unpredictable seizures. Because such loses of consciousness are both involuntary and unpredictable, with the reasonable possibility that another seizure could occur at any given moment, persons who suffer form such seizures are not able to rely upon their ability to maintain their consciousness. If we accept maintaining consciousness as essential to living our lives, and to caring for and protecting ourselves, then it is the inability to rely on maintaining our consciousness that is substantially limiting of that activity.

Because maintaining consciousness is one of the most *major* of life's activities, and because Ms. Chenoweth, as a result of her unpredictable, consciousness-losing seizures, was unable to rely on her ability to maintain her consciousness, she was substantially limited in that major life activity.

c. Ms. Chenoweth's seizures substantially limited her major life activity of "working":

Under the implementing regulations of the ADA, Ms. Chenoweth must establish that she was precluded from a "broad range of jobs in various classes as compared to the average person having comparable training, skills and ability," in order to show that her seizures substantially limited her major life activity of "working." *See* 29 C.F.R. §1630.2(j)(3)(i); *see also, Sutton* at 484. In applying this standard to the instant case, it is submitted that Ms. Chenoweth was precluded from an extremely wide range of jobs during the period when her seizures were uncontrolled

i. An individual who cannot drive is precluded from working any job that involves a fixed location during fixed hours: Using an alternative to driving, such as relying on friends and family, does not allow an impaired individual to

be *personally responsible* for arriving at work at a fixed time and place each day. Public transportation is also not a substitute for the ability to drive because it is not available 24 hours a day, may not serve the intended destination, may not be accessible, and is often not punctual. To the extent that this limitation might be mitigated by the existence of any jobs that are within walking distance, or ones that are reasonably accessible through public transportation, it is submitted an impaired individual would at least be precluded from all jobs that are not so accessible, but which would have been accessible, but for the impairment.

ii. An impaired individual who cannot drive is precluded from working in any job that requires driving an automobile in order to fulfill the essential functions of that job: Numerous jobs in today's society, including Ms. Chenoweth's job as it existed prior to the onset of her seizures, require driving in order to perform the essential functions of the jobs. Sales jobs, customer "on site" service jobs, installation jobs, transportation jobs (i.e., driving a bus, a cab, etc.) and any other job where the duties are not performed in one fixed location, are unavailable to impaired individuals who cannot drive.

The inability to drive precludes an Epileptic from an extremely wide range of jobs, crossing almost all occupational categories. Because Ms. Chenoweth's seizures prohibited her from driving, she was substantially limited in the major life activity of working.

d. Ms. Chenoweth's seizures substantially limited her major life activity of "driving":

There can be little question that Ms. Chenoweth's seizures substantially limited her ability to drive an automobile. The only question is whether "driving" is a major life activity. In *Bragdon*, this Court set forth the test

for determining what is a major life activity. In concluding that "reproduction" is a major life activity, this Court reasoned, "the touchstone for determining an activity's inclusion under the statutory rubric (of major life activity) is its significance." *Id.* at 638, (quoting *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997)).

In American society, there are few *activities* that are as important as driving. Driving one's own vehicle has become the primary means of transport for an overwhelming majority of Americans and has become a major activity of our daily lives. Because Ms. Chenoweth's seizures prohibited her from driving, that major life activity of was not only substantially limited, it was eliminated.

II. THE ELEVENTH CIRCUIT'S HOLDING, THAT EMPLOYERS ARE REQUIRED TO ACCOMMODATE ONLY THOSE LIMITATIONS OF A QUALIFIED DISABILITY WHICH SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY, AS OPPOSED TO OTHER, KNOWN COLLATERAL LIMITATIONS OF THE DISABILITY WHICH DO NOT, IS INCONSISTANT WITH THE PLAIN LANGAUGE OF THE ADA.

Ms. Chenoweth also contends that she has a "disability," within the meaning of the ADA, because her Epilepsy, and the seizure medication she takes, substantially limits her major life activity of reproduction and childbearing.[17] It is her position, as a qualified individual

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[17] Children of mothers with Epilepsy are 300% more likely (3% compared to 1%) to be born with Epilepsy, 200% more likely (4-6%

with a disability, that she is a member of the ADA's protected class and, therefore, entitled to be accommodated by the County for *any known physical or mental limitation* caused by her Epilepsy. Because Ms. Chenoweth's Epilepsy was "known" to limit her ability to rely on maintaining her consciousness (even if, for the purpose of argument, "maintaining consciousness" is not, itself, a major life activity, as discussed in part I, 3 b above), her employer was obligated to accommodate that limitation.

In analyzing whether Ms. Chenoweth is a qualified individual with a disability, entitled to an accommodation from her employer, the Eleventh Circuit acknowledged that reproduction ("childbearing") is a major life activity and that Ms. Chenoweth had an "increase in risk in this regard," but held that such risk "*had no relevance at all to her work* for the County *or to her request* to the County *for accommodation*."(App., *infra* at 4a). While it is unclear, on the surface, exactly what the circuit court was trying to say here, there appears to be only two possible interpretations. One, is that while Ms. Chenoweth may be substantially limited in the major life activity of reproduction, she is not

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compared to 2-3%) to have a major birth defect, and 300% more likely (1.7%) to stillbirth or miscarry, than the general population. There is also an increased risk of infant mortality in the first year of life. *See* Epilepsy Foundation, *Epilepsy & Pregnancy* 15, 21-22 (1998). *See also* the testimony of Dr. Stevenson. (R4-81-91). Ms. Chenoweth was a registered nurse for over 14 years at the time this litigation was initiated, and was well aware of these increased risks. Ms. Chenoweth testified that she made a decision to forego her desire to have children because of these negative effects of her Epilepsy and the seizure medication she takes. (R4-81-30 to 32). This testimony is undisputed in the record. Because this Court, in *Bragdon*, found "reproduction" to be a major life activity, because Ms. Chenoweth has, at least, established a triable issue of fact as to her claim of a substantial limitation on that major life activity, and because this cause is being reviewed in the context of a summary judgment, her contention that she is a qualified individual with a disability must be taken as true. Fed. Rule Civ. Proc. 56 (e).

"disabled" under the ADA, because the substantial limitation on her reproduction bears no relationship to her work. The other, is that while Ms. Chenoweth may be substantially limited in the major life activity of reproduction and, therefore, "disabled" under the ADA, she is not entitled to be "accommodated" *if the limitation sought to be accommodated is a collateral one that does not, itself, substantially limit a major life activity.* Because this Court has recognized that a person, substantially limited in the major life activity of "reproduction", *is* "disabled" within the meaning of the ADA, *see Bragdon*, we assume the circuit court meant the later of these two possibilities.

In discussing this issue, the Eleventh Circuit did not explain its reasoning, nor did it cite any authority in support of its conclusion. In response, it is respectfully submitted that there is no authority for such a conclusion, and that such conclusion is, in fact, contrary to clear intention of Congress and the plain language of the ADA.

If it is accepted that Congress, through the ADA, intended to protect the ability of disabled individuals to obtain and maintain employment, and that, in so doing, it sought to foster full employment and self-sufficiency for such individuals, then it only makes sense that Congress would have intended for employers to accommodate all of the limitations that a disability produces. It would not make sense to say, "yes, an individual is 'disabled'" and "yes, their disability produces a limitation that interferes with their ability to perform the essential functions of their job," but "no, an employer is not required to accommodate such limitation, because it is not the specific limitation of the disability that substantially limits a major life activity."

Section 12112(b)(5)(A) of the ADA requires employers to provide reasonable accommodations to the "known physical or mental limitations of an otherwise

qualified *individual* with a disability...."(Emphasis added). It is noted, that this section refers to limitations of the "individual", not to limitations of the qualifying major life activity. The plain meaning of this provision is that an employer is obligated to accommodate *any known physical or mental limitation* of a "disabled" employee's impairment, even if a particular targeted limitation does not, itself, substantially limit a major life activity.

If it is assumed that Ms. Chenoweth's Epilepsy, and the side effects of her seizure medication, substantially limit her major life activity of reproduction, and if it is accepted that the ADA requires employers to accommodate all known limitations, direct and collateral, of qualified "disabilities," then the Eleventh Circuit was in error when it concluded that the County was not obligated to accommodate Ms. Chenoweth's inability to drive, simply because the substantially limiting effect that Ms. Chenoweth's Epilepsy has on her major life activity of reproduction bares no "relevance" to her work or the accommodations she requested.

CONCLUSION

For the forgoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10691

D.C. Docket No. 97-20335-CIV-T-24A

CHARLOTTE J. CHENOWETH

Plaintiff-Appellant,

versus

HILLSBOROUGH COUNTY, a political
Subdivision of the State of Florida

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(May 10, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges.

NOONAN, Circuit Judge:

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*Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Charlotte J. Chenoweth appeals the judgment of the district court for the middle district of Florida. The principle issue on this appeals is whether inability to drive to work for six months qualifies as an impairment substantially limiting a major life activity under the Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (the ADA) or under the Rehabilitation Act, 29 U.S.C. §794. Recognizing that many Americans do drive to work and that in rural areas public transportation may sometimes not be available when needed, we nonetheless hold that such inability does not qualify under either act, and we therefore affirm the summary judgment granted by the district court.

FACTS

Chenoweth is a well-educated, 41 year-old woman with over fourteen years of nursing experience. She has worked for Hillsborough County (the County) as a registered nurse since March 27, 1995, employed as Utilization Review/Network Case Manager Nurse in the County's Department of Health and Social Services. Her job is to review the files of hospital patients for whom the County is financially responsible. According to Chenoweth, she was able to perform some of these reviews at home on her own computer. She lived in Pinellas County and normally drove to her job, also driving between different sites where she carried out file reviews for the County.

In January 1997 Chenoweth suffered a seizure and was subsequently diagnosed as having focal onset epilepsy. On April 30, 1997, her physician prescribed Lamictal as medication. He also advised her not to use a stove or to bathe by herself and not to drive at all until she had gone six months without experiencing a seizure. One effect of the medication was to increase the risk of bearing a child with birth defects. Her ability to do her regular job was not

affected. She resumed driving sometime between January and March 1998.

In the period from April 1997 to early 1998 Chenoweth sought accommodation from the County because she could not drive. She proposed that she work two days at home and that her schedule at the office be made variable to accommodate her transpiration needs. The County agreed to eliminate her driving between different work sites, but did not accede to her other requests.

PROCEEDINGS

On September 23, 1997, Chenoweth brought the present suit, alleging a variety of claims under federal and state law, the majority of which have been either dismissed or settled. On December 16, 1999, the magistrate judge denied Chenoweth's motion for summary judgment on the ADA and Rehabilitation Act claims and granted the County's motion for summary judgment on them, finding that Chenoweth was not disabled within the meaning of these laws.

Chenoweth appeals.

ANALYSIS

Under the ADA a disability is "a physical or mental impairment that substantially limits one or more...major life activities." 42 U.S.C. §12102(2)(A). Major life activities are enumerated by EEOC regulation as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i). Although this enumeration is not exhaustive, driving is not only absent from the list but is conspicuously different in character from the activities that are listed. It would at least be an oddity that a major life

activity should require a license from the state, revocable for a variety of reasons including failure to insure. We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn. *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998); cf. *Anderson v. N.D. State Hosp.*, 232 f.3d 634, 636 (8th Cir. 2000).

Chenoweth's case, then, depends on the argument that her inability to drive substantially limited her ability to work. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (working assumed to be a major life activity). We look at her individual circumstances. *Id.* At 483. Chenoweth produced no evidence that she was, in fact, unable to perform her job. Neither did she offer any evidence showing that the County regarded her as disabled to perform her work. Nothing in the record prevented summary judgment on her claim of disability to work. On this appeal Chenoweth points also to the effect of epilepsy on her reproductive capacity. Childbearing is a major life activity, *Bragdon v. Abbott*, 524 U.S. 624 (1998). But the increase in risk in this regard had no relevance at all to her work for the County or to her request to the County for accommodation.

Accordingly, the judgment for the County is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10691 - EE

CHARLOTTE J. CHENOWETH,

Plaintiff-Appellant,

versus

HILLSBOROGH COUNTY, a political subdivision of the State of Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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(June 25, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges

PER CURIAM: The petition(s) for rehearing filed by Appellant, Charlotte J. Chenoweth, is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes

UNITED STATES CIRCUIT JUDGE

*Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLOTTE J. CHENOWETH

Plaintiff,

vs. CASE NO.: 97-2335-CIV-T-24A

HILLSBOROUGH COUNTY, a political subdivision of the State of Florida,

Defendant.

_____/

ORDER

After United States District Judge Susan C. Bucklew denied the Defendant's motion or summary judgment as to Plaintiff's ADA and Rehabilitation Act claims, the United States Supreme Court ruled in *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999) that the determination of whether an individual is disabled should be made with reference to the measures that mitigate the individual's impairment. Given these developments, the parties conducted further discovery to evaluate Plaintiff's treatment for epilepsy in light of *Sutton*, and both sides filed cross motions for summary judgment addressing these new issues (docs.80 and 81). After consideration, I find that Plaintiff is not disabled

and grant summary judgment for the Defendant on Counts I and II of Plaintiff's Amended Complaint.[1]

A. Background

Plaintiff Charlotte Chenoweth, a registered nurse, has been employed by Hillsborough County since March 1995. In January 1997, she suffered a seizure and was diagnosed with focal onset epilepsy (Chenoweth deposition, p. 277, line 22). Though she does not recall specific dates, the Plaintiff says she had two more seizures during 1997. All three seizures occurred after work hours or on the weekend. She testified that following each seizure she was incapacitated for a day or so, and she believes she missed on day of work following one seizure (Chenoweth deposition, p. 288, line 19 and p. 289, lines 8-9).

Since April 30, 1997, she has been taking the medication Lamictal to control her epilepsy (Dr. Stevenson deposition, p. 33, lines 19-21). Prior to starting Lamictal, Plaintiff tried several other medications to control her seizures but discontinued these drugs due to problems with side effects. The Plaintiff has experienced "many, many" auras,[2] lasting anywhere from a few seconds to one minute (Chenoweth deposition, p. 299, line 7). She testified that she still has auras, and that she is able to alleviate the sensation by getting up and walking. According to the Plaintiff, the

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1. After Judge Bucklew entered her summary judgment order, but before the Supreme Court issued its decision in *Sutton*, the parties consented to proceed before me pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

2. Auras are sensory or psychic manifestations that immediately precede complex partial or generalized tonic-clonic seizures and represent seizure onset. *The Merck Manual of Diagnosis and Therapy, § 14 Neurologic Disorders, Ch. 172 Seizure Disorders.*

auras do not prevent her from performing her job or affect her job in any way (Chenoweth deposition, p. 300, lines 25-23).

As a safety precaution, Plaintiff's doctor advised her not to take a bathe or use a stove without supervision (Chenoweth deposition, p. 303, lines 19-20). He also advised Plaintiff not to drive, and as a result she began having difficulty finding transportation to and from work. To accommodate this problem, the Plaintiff requested that she be allowed to work from home two days each week (Amended Complaint, ¶ 26 and Exhibit D).[3] Defendant denied Plaintiff's request, determining that her request was not a reasonable accommodate since it concerned accommodating her transportation problems in getting to work, not in performing the essential functions of her job. The Defendant suggested an alternative accommodation that would allow her to perform the essential functions of her job. Specifically, the Defendant offered to assign Plaintiff to one work location so that she would not be required to drive a vehicle to different work locations to perform her job (Amended Complaint, Exhibits E and G).[4]

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3. The Plaintiff testified that she requested this accommodation "to reduce the driving stress on the people in [her] life" (Chenoweth deposition, p. 324, lines 5-6). She further testified that she told her employer that she would make her weekly appointments with her psychologist, and when needed, her appointments with Dr. Stevenson, her neurologist on the days that she worked at home (Chenoweth deposition, p. 325, lines 7-16).

4. The Defendant's Reasonable Accommodations Committee sent a memorandum to the Plaintiff that indicated "[h]ow Charlotte get's to work is not managements responsibility. She is medically able to perform the essential functions of her position with accommodations....Since Charlotte cannot drive at this time and it is uncertain how long this might go on, the assignment to one location seemed logical and reasonable. Charlotte's inability to drive while at work has been accommodated" (Exhibit K to doc. 80).

Thereafter, the Plaintiff requested a second accommodation due to her continued transportation problems; she requested variable work hours beginning between 6:00 a.m. to 8:30 a.m. and ending between 3:00 p.m. and 5:30 p.m. (Amended Complaint, ¶32). Defendant denied this request, advising the Plaintiff that she needed to work through 5:00 p.m. daily in the office (Amended Complaint, ¶32).

The Plaintiff claims she is substantially limited in her ability to chose a mate, reproduce (due to side effects from her medication and increased risk of birth defects), water ski, dive, snorkel, swim, boat, snow ski, and find a new job with health insurance coverage as a result of her epilepsy. She also testified she has difficulty at times with coordination as a result of side effects from her anti-seizure medication, though she says her coordination does not substantially limit her ability to walk, stand, or lift (Chenoweth deposition, p. 314, lines 8-10). The Plaintiff testified that she has never needed assistance in completing her job while at work (Chenoweth deposition, p. 278, lines 9-17). At the time of her continued deposition, November 29, 1999, Plaintiff's doctor had lifted his restrictions on Plaintiff bathing and using the stove alone, and she had resumed driving. The Plaintiff said that she resumed driving between January and March 1998 (Chenoweth deposition, p. 322, lines 16-19). She also testified that since resuming driving she has not needed to request any accommodations and no longer needs the accommodation of flexible work hours (Chenoweth deposition, p. 344, line 24 and p. 325, lines 21-22). Likewise, the Plaintiff's neurologist testified that aside from the restrictions he placed on her described above, she has been able to function without any limitations since he began treating her in March 1997 (Dr. Stevenson deposition, p. 46, line 8).

B. Standard for summary judgment

Motions for summary judgment should only be granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)(emphasis in original). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.*

C. Discussion

1. Plaintiff has not established that she is disabled as defined by the ADA.

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b). The act intended to foster the nation's goals of "...equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals, and combat the stereotypical assumptions that such persons cannot participate in and contribute to society. *See* U.S.C. § 12101(a)(7), (8). Disability as defined in the ADA does not mean *any disability*. To be considered disabled for purposes of the ADA, Plaintiff must prove that she: (1) has a physical or mental impairment that substantially limits one or more of her major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment by her employer. 42 U.S.C. §12102(2)(A)-(C).

a. Plaintiff is not substantially limited in any major life activities.

In evaluating Plaintiff's impairment, this Court is required to consider corrective measures in determining whether Plaintiff is substantially limited in any of her major life activities. *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999). In other words, Plaintiff is considered disabled under subsection (A) if, notwithstanding the use of corrective device or medication, she is substantially limited in a major life activity. "The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." *Id.* at 2148. Whether an impairment "substantially limits" a major life activity is determined by (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *See* 29 C.F.R. § 1630.2(j)(2).

Although the ADA does not define the term "major life activities," the regulations implementing the ADA interprets "major life activities" to mean functions *such as* caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1631.2(h)(2)(I). Courts interpreting the ADA have consistently held that driving is not a major life activity.[5]

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5. See *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635 (2d Cir. 1998), cert. den'd, 119 S.Ct. 1253 (1999) (driving is not a major activity); *Wade v. General Motors Corporation*, 1998 WL 639162 (6th Cir. 1998) (inability to drive in darkness is not a substantial limitation on a major life activity, plaintiff should forego driving himself and find another means of transportation to and from work); Wyland *v. Boddie-*

Likewise, at least one court has found that various leisure or recreational activities are not major life activities.[6]

In *Bragdon v. Abbott,* 118 S.Ct. 2196, 2205 (1998), the Supreme Court held that reproduction is a major life activity for ADA purposes; it also concluded, based on the record evidence, that the respondent's HIV infection substantially limited her ability to reproduce. Plaintiff, citing *Bragdon,* claims her epilepsy substantially limits her ability to reproduce because her child would have increased risk for birth defects (*see* Dr. Stevenson deposition at p. 53, lines 4-7). The Defendant, on the other hand, urges *Bragdon* is distinguishable from the Plaintiff's case. I agree.

The *Bragdon* Court emphasized the HIV disease "follows a predictable and, as of today, an unalterable course." *Id,* at p. 2203. The disease's course is "pervasive and invariably fatal." *Id,* at p. 2204. Based upon the evidence before it, the Court noted the respondent's HIV infection limited her ability to reproduce in two ways: first, it imposed on the man a significant risk of becoming infected; and second, an infected woman faced about a 25% risk of passing the disease to her child during gestation and childbirth. *Id,* at p. 2206. Unlike the respondent in *Bragdon,* Plaintiff has not presented evidence that she is similarly

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Noell Enterprises, Inc., 1998 WL 795173, n. 1 (4th Cir. 1998) (driving is not a major life activity).

6. *See Colwell v. Suffolk County Police Dept.,* 158 F.3d 635 (2d Cir. 1998), cert. den'd, S. Ct. 1253 (1999) (finding that Plaintiffs' leisure activities of doing mechanical work on cars, performing housework, going shopping in the mall, skiing, golfing, doing yard work, moving furniture, painting, plastering, gardening, shoveling snow, engaging in exercise clearly fall outside the range of "major" life activities).

impacted even when it is viewed in the light most favorable to her. Moreover, *Bragdon* must be read in light of the Supreme Court's trilogy of recent ADA decisions. *Sutton, supra; Albertsons, Inc. v. Kirkingburg,* 119 S.Ct. 2162 (1999); *Olmstead v. L.C. Ex Rel. Zimring,* 119 S.Ct. 2176 (1999). For example, in *Sutton,* the Supreme Court instructed that a disability exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting. *Id.* at 2146. Courts are not to speculate about a person's condition nor make a disability determination based upon general information about how an impairment usually affects individuals. Instead, courts are to make an individual inquiry considering the effect of the specific impairment on the individual. *Id.* at 2147.

Neither has Plaintiff presented evidence substantiating her other claims. Her argument that her impairment restricts her abilities to choose a mate and get married is contradicted by her admission that she has dated her fiancé' since 1997. Likewise, her assertions she is *substantially* restricted in the major life activities of memory, good health, clumsiness and muscular control, and emotional stability (assuming for purposes of summary judgment that these are "major life activities") are rebutted by the evidence.

Lastly, I find that she is not substantially limited in the major life activity of working. According to *Sutton,* to be substantially limited in the major life activity of working, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. *Sutton* at 2151. Plaintiff has testified that she is able to perform the essential functions of her job with Hillsborough County without accommodations; therefore, she is not substantially limited in working.

b. Plaintiff has not shown a record of impairment

Alternatively, Plaintiff argues that she is disabled under 42 U.S.C. § 12102(2)(B),[7] the relevant regulation defines record of impairment as meaning that a person "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k) (1997). As the Eleventh Circuit recently noted:

> This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment...There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) quoting 29 C.F.R. pt. 1630, App. § 1630.2(k) (1997).[8] Plaintiff points to a written report prepared by her treating doctor containing a statement that her seizures would substantially limit one or more of her major life activities. Though her employer's Reasonable

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7. Count I of the Plaintiff's Amended Complaint alleges only that she is a "qualified individual with a disability" and that she has been discriminated on the basis of her disability or perceived disability consistent with 42 U.S.C. § 12102 (2)(A) and (C). However, she now argues that she is disabled under 42 U.S.C. § 12102(2)(B).

8. The *Hilburn* court found that the plaintiff's doctors' conclusory statement that plaintiff was substantially limited in performing manual tasks was not probative since the record was devoid of any specific facts substantiating the doctor's conclusion. *Id.* at 1228. Similarly, in this case the Plaintiff has failed to substantiate her doctor's conclusory statements (See Exhibit F to doc. 80) that her seizures would substantially limit one or more unspecified major life activities.

Accommodations Committee may have relied upon the doctor's conclusory statement in establishing accommodations for the Plaintiff's inability to drive during working hours, Plaintiff has not proven that she is disabled under § 12102(2)(B) because her employer never concluded that she was *substantially* limited in one or more major life activities.

c. Plaintiff has not shown that Defendant regarded her as disabled

By including the "as regarded" part of the definition of disability, Congress intended to protect people from a range of discriminatory actions based upon myths, fears, and stereotypes about disability, which occur even when a person does not have a substantially limited impairment. *See* 29 C.F.R. Pt. 1630 Appendix (Interpretive Guidance on Title I of the Americans with Disabilities Act). § 1630.2(1).

There are two apparent ways in which Plaintiff may satisfy § 12102(2)(C); (1) by showing that Defendant mistakenly believes that she has a physical impairment that substantially limits one or more major life activities; or (2) by showing that Defendant mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *Sutton, supra,* at 2141. Standing alone, Plaintiff's allegation that Defendant regarded her as epileptic does not establish a claim that Defendant regarded her as substantially limited in a major life activity. Plaintiff has not proffered any evidence to even remotely suggest that Defendant regarded her as having such a debilitating impairment; nor is there any evidence suggesting that Defendant discriminated against Plaintiff based upon a "myth, fear, or stereotype" associated with her impairment. Indeed, the record strongly suggests just the opposite. The record shows that Defendant made an accommodation for Plaintiff by altering her driving responsibilities during work

hours. Such accommodation shows that Defendant did not regard Plaintiff as suffering from a debilitating illness that substantially limited one or more of her major life activities.

2. The accommodations requested by Plaintiff were not reasonable

Plaintiff requested her employer to allow her to work from her home several days each week, and later requested flexible work hours.[9] These requests were made in light of Plaintiff's difficulty finding transportation to and from work due to her inability to drive. The EEOC regulations provide that an employer's obligation to make reasonable accommodations for disabled employees does not extend to adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Appendix to Part 1630. Under this premise, the Sixth Circuit has held that the ADA does not require an employer to accommodate an employee who cannot get to work. *See Wade v. General Motors Corporation*, 1998 WL639162 (6th Cir. 1998) ("we know of nothing in the ADA or the cases decided under it that would put the responsibility for [transportation to and from work] on the employer rather than the employee").[10] In other words, because attendance is an essential function of

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9. Plaintiff's argument that the county should accommodate her with flexible work hours because it has accommodated other employees with flexible work hours is not well taken. The fact that certain accommodations may have been provided to some employees does not mean that they must be extended to Plaintiff. Such a policy would discourage discretionary accommodations and undermine Congress' stated purpose of eradicating discrimination against disabled persons. *See Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) citing *Traynor v. Turnage*, 485 U.S. 535, 549 (1988) and *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

10. Published opinions may be cited as persuasive as provided by 11th Cir. R. 36-2.

employment, an employee's inability to get to work on time makes the employee unqualified to perform the functions of the job.[11]

D. Conclusion

As the Supreme Court recognized in *Sutton*, in enacting the ADA, Congress found that "some 43 million Americans have one ore more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;" this figure reflects an understanding that those persons whose impairments are largely correctly by medication or other devices are not "disabled" within the meaning of the ADA. I find that Plaintiff is one of those persons whose corrected physical limitations fall short of the definition of "disabled" and that she is not covered by the ADA.

IT IS HEREBY ORDERED that:

1. Plaintiff's motion for partial summary judgment (doc. 81) is DENIED;

2. Defendant's motion for summary judgment as to the ADA and rehabilitation claims (doc. 80) is GRANTED to the extent that summary judgment is granted as to Counts I and II of Plaintiff's Amended Complaint.

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11. The Eleventh Circuit has not ruled on the precise issue of whether an employer must accommodate an employee in getting to and from work. However, this circuit has held that there was no reasonable accommodation that the employer could have made to accommodate its employee's absences when regular attendance was an essential element of the employee's job). See *Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir.1994).

DONE AND ORDERED in chambers at Tampa, Florida on this 16th day of December, 1999.

/s/ Mark A. Pizzo

MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE

Copies to: Counsel of Record

APPENDIX C

RELEVANT STATUTES AND REGULATION

1. Americans with Disabilities Act, 42 U.S.C. §12101, *et. seq.*

§ 12102. Definitions

As used in this Act: * * *

(1) Disability

The term disability means, with respect to an individual.

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

§ 12111. Definitions

As used in this title: * * *

(8) Qualified individual with a disability:

The term qualified individual with disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation.

The term reasonable accommodation may include

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. * * *

§ 12112. Discrimination.

(a) General Rule.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction.

As used in subsection (a), the term discriminate includes * * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; * * *

2. ADA Regulations, 29 C.F.R. Part 1630

§1630.2 Definitions.

* * *

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*

(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment

(3) With respect to the major life activity of "working" - -

(i) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access:

(B) The job from which the individual has been disqualified because of an impairment, and the number of types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment,

and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(o) *Reasonable accommodation.* –

(1) The term "reasonable accommodation" means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. * * *

§ 1630.4 Discrimination prohibited.

It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual * * *

The term "discrimination" includes, but is not limited to, the acts described in sections 1630.5 through 1630.13 of this part.

1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations

of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business * * *